The Continuing Evolution of Indiana's Family Law in 1991

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Introduction

During this survey period, the Indiana appellate courts issued more than sixty reported decisions in the traditional "family law" areas: dissolution of marriage, custody, visitation, paternity, adoption, and support. Many of the decisions applied established precedent with predictable results. There were also decisions furthering recent developments in our courts' attempts to deal with contemporary societal concerns: fairness in property distributions, the extent of a divorced parent's obligation to provide for his children, the effect of marital misconduct, including the possible transmission of the HIV virus, and the standards for placing mistreated children with private third parties who seek custody from natural parents. On the federal level, the United States Supreme Court decided an important case clarifying the dischargeability of a judgment lien arising from a property distribution order.

New legislation has been enacted that focuses on children and related issues. One act establishes a committee of judges, legislators, professionals, and a custodial and noncustodial parent to review annually the Child Support Guidelines and make recommendations to the Indiana Supreme Court. The cases and legislation reviewed contribute to the clarification or development of the primary incidents of family law.

I. Property Distribution

Arguably, the most significant developments in family law involve property distribution in dissolution proceedings. Whether an asset is includible in the marital estate, its value and its distribution are the primary concerns. Although most of these cases clarify the issues, some continue to pose questions that need to be revisited.

A. *Is It Marital Property?*

The court of appeals has continued the trend toward recognizing antenuptial agreements. In a rather bold, somewhat surprising decision,

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the court extended the analysis to a post-nuptial reconciliation agreement.

In *DeHaan v. DeHaan*,[1] the First District Court of Appeals held that the parties' antenuptial agreement did not prevent disposition of company stock as marital property.[2] The two page "Marital Property Agreement," executed prior to marriage, spoke only to alimony and child support and did not address division of marital assets.[3]

The value of the wife's estate on the date of marriage was not mentioned in the agreement. Although the agreement stated the value of the husband's estate to be $250,000, it otherwise failed to mention property or property settlement.[4] The trial court found that the parties' agreement barred only the wife's claim to spousal support, not her claim to his property, and would be unconscionable if it did. The court rejected the husband's argument that "alimony" referred to property at the time the agreement was entered.[5] The Indiana Supreme Court decision in *In re Boren*[6] was found inapplicable because the agreement in that case included language specifically addressing the parties' rights regarding property each had brought into the marriage or acquired thereafter.[7]

In *Flansburg v. Flansburg*[8] the Third District Court of Appeals, in a case of first impression, affirmed the trial court's application of the law of antenuptial contracts to a post-nuptial reconciliation agreement that was supported by sufficient consideration and not procured by fraud.[9] Although labeled a "Post-Nuptial Agreement," the settlement was negotiated by the parties well into their marriage to facilitate reconciliation and primarily concerned distribution of property acquired prior to marriage. Citing law from other jurisdictions, the court of appeals held that just as marriage is adequate consideration for an antenuptial agreement, the extension of a marriage that would have been dissolved but for execution of an agreement to reconcile is adequate consideration for a post-nuptial contract.[10] The court noted that the wife had counsel and entered into the contract voluntarily with full knowledge

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1. 572 N.E.2d 1315 (Ind. Ct. App. 1991).
2. *Id.* at 1323.
3. *Id.* at 1318, 1321.
4. *Id.* at 1321-22.
5. *Id.*
6. 475 N.E.2d 690 (Ind. 1985).
7. DeHaan v. DeHann, 572 N.E.2d 1315, 1322 (Ind. Ct. App. 1991).
8. 581 N.E.2d 430 (Ind. Ct. App. 1991).
9. *Id.* at 437.
10. *Id.* at 433. The court cited: Stadther v. Stadther, 526 S.2d 598 (Ala. Civ. App. 1988); Hanner v. Hanner, 388 P.2d 239 (Ariz. 1964); Curry v. Curry, 392 S.E.2d 879, 880 (Ga. Ct. App. 1990); Gilley v. Gilley, 778 S.W.2d 862, 863 (Tenn. Ct. App. 1989); Yeich v. Yeich, 399 S.E.2d 170 (Va. Ct. App. 1990).

of her husband's financial status.[11] In a sweeping conclusion, the court found that "a reconciliation agreement may be enforced as long as it is entered into freely and without fraud or misrepresentation, or is not otherwise unconscionable."[12] The court did not indicate what factors may lead to a finding of unconscionability or whether this is measured by reference to the parties' assets at the time of execution or at the time a dissolution action is filed. It is unclear how the extension of a marriage that was not dissolved provides adequate consideration. If the marriage had failed one month later would the court's decision have been different?[13] In a prenuptial agreement it is not the promise of a lasting marriage that provides the required consideration, but the promise to marry. Also, the court did not draw a distinction between post-nuptial agreements and reconciliation agreements.

A strong dissent by Judge Garrard revealed that he would have reversed and remanded the case because the agreement was not an antenuptial agreement and the policy reasons supporting the validity of agreements entered into in contemplation of an impending marriage were not present.[14] The agreement was not validated by the dissolution statute regarding property settlement agreements because it was not entered into "attendant upon the dissolution of their marriage"[15] and because there was no language in the agreement that the parties wished to reconcile and make their marriage work. It merely permitted the wife to return home with her daughter if she paid one-half of ongoing living expenses and relinquished any claim to her husband's property. Judge Garrard believed that the impact of the agreement impeded rather than promoted honest efforts at reconciliation.[16] Due to the problem of finding valid consideration and the distinction between public policy supporting pre-nuptial agreements and reconciliation agreements, this decision may be reversed by the Indiana Supreme Court.[17]

Recent pension cases address whether benefits are marital property. In *Staller v. Staller*,[18] the husband appealed the trial court's inclusion of a portion of his thrift and profit sharing plans as a marital asset, complaining that a portion of those benefits did not vest until after the date of filing. The court of appeals affirmed the trial court's inclusion

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11. *Flansburg*, 581 N.E.2d at 433.

12. *Id.* at 437.

13. In this case the parties reconciled and remained married for three years.

14. Flansburg v. Flansburg, 581 N.E.2d 430, 437 (Ind. Ct. App. 1991) (citing *In Re Marriage of Boren*, 475 N.E.2d 690 (Ind. 1985)).

15. *See* IND. CODE § 31-1-11.5-10 (1988).

16. *Flansburg*, 581 N.E.2d at 437 (Garrard, J., dissenting).

17. A Petition to Transfer and Brief in Opposition have been filed.

18. 570 N.E.2d 1328 (Ind. Ct. App. 1991).

of all plan benefits as marital assets.[19] Citing *In re Marriage of Adams*,[20] the court held that when the plan is an element of property acquired by the joint efforts of the parties and the right to the property is vested prior to the final decree, the plan is properly a marital asset.[21]

In *In re Marriage of Battles*,[22] the court of appeals affirmed the trial court's exclusion of a husband's military benefits from the marital pot because at the time of the final hearing, he was not yet eligible to retire and had no vested interest in his military pension.[23] A military pension falls within the ambit of Indiana Code section 31-1-11.5-2(d)(3) and requires, for inclusion in the marital pot, that the right to receive disposable retired or retainer pay be acquired during the marriage.[24]

B. What Is It Worth?

The court of appeals continues to hold that only those tax consequences necessarily arising as a direct result of the property disposition may be considered when valuing assets. Two recent decisions illustrate how narrow this area is becoming. In *DeHaan v. DeHaan*,[25] the trial court was held to have abused its discretion in considering future capital gains tax from the potential resale of low basis stock in a closely held corporation.[26] The court based its decision on the fact that the wife's future sale of the stock was remote and not a direct consequence of the property disposition itself.[27] The court cited *Harlan v. Harlan*[28] as dispositive and noted that the holding in *Harlan* is broad and not limited to the facts of that case.[29] *DeHaan* is quite significant because the difference in value attributable to potential income tax on capital gains was over twenty million dollars, and the court rejected the wife's argument that a distinction should be drawn between a "taxable event," which

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19. *Id.* at 1332.

20. 535 N.E.2d 124 (Ind. 1989). The court held that the husband's police pension benefits, which did not become nonforfeitable upon termination of employment until three months after he filed for divorce, and prior to trial, were properly included as a marital asset subject to distribution. *See* Ind. Code § 31-1-11.5-2(d)(2) (1988).

21. *Staller*, 570 N.E.2d at 1331-32.

22. 564 N.E.2d 565 (Ind. Ct. App. 1991).

23. *Id.* at 566-67.

24. Ind. Code § 31-1-11.5-2(d)(3) (1988).

25. 572 N.E.2d 1315 (Ind. Ct. App. 1991).

26. *Id.* at 1327.

27. *Id.*

28. 560 N.E.2d 1246 (Ind. 1990) (affirming the court of appeals' holding in *Harlan v. Harlan*, 544 N.E.2d 553, 555 (Ind. Ct. App. 1989), that Indiana Code § 31-1-11.5-11.1 (1988), requires the trial court to consider only the direct or inherent and necessarily incurred tax consequences of the property disposition).

29. *DeHann*, 572 N.E.2d at 1327.

appears to be required, and a "tax consequence" that would be realized upon her future sale of the stock.[30]

Likewise, in *Granger v. Granger*[31] the trial court was reversed on appeal for deducting a possible tax liability arising from the sale of the husband's laundromats.[32] The Second District Court of Appeals held that the marital estate could not be reduced by $53,200 for the anticipated tax liability from a possible future sale of laundromats the husband claimed he intended to sell.[33] Only those tax consequences necessarily arising from the plan of distribution were to be taken into account.[34] Although the court noted that the laundromats were not ordered sold and the husband could borrow money to meet his obligations under the property division if his income became insufficient, the facts did suggest sale was imminent. The court may have been stretching a bit when it emphasized that "[t]he record does not establish the sale of *both laundromats* was an immediate consequence of the property disposition."[35]

In *Staller v. Staller*[36] the court of appeals held that the trial court did not abuse its discretion in valuing a husband's pension plan at his earliest unreduced retirement date.[37] On appeal, the husband complained that the court's decision would require him to retire early to preserve his wife's share of the pension plan. The appellate court rejected this argument, holding that the trial court had merely assigned the wife a one-half interest in her husband's pension benefits that accrued during the course of the parties' marriage.[38] She had not been given an immediate right to the value of the pension. The court was careful to distinguish *In re Marriage of Adams*,[39] and held that the trial court's order did not impose an early retirement date.[40]

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30. *Id. See* Ind. Code § 31-1-11.5-11.1 (1988) which states that the court, in determining what is just and reasonable in dividing property, shall consider the tax consequences of the property distribution with respect to the present and future economic circumstances of each party.

31. 579 N.E.2d 1319 (Ind. Ct. App. 1991).

32. *Id.* at 1321.

33. *Id.*

34. *Id.* at 1320.

35. *Id.* at 1321. Because transfers of property between divorcing spouses are nontaxable events pursuant to 26 U.S.C. § 1041(a) (1988), it would appear that the only time tax consequences will be properly considered is when sale of an asset is ordered by the court as part of the property division.

36. 570 N.E.2d 1328 (Ind. Ct. App. 1991).

37. *Id.* at 1332.

38. *Id.*

39. 535 N.E.2d 124 (Ind. 1989) (remanded to clarify the commencement date for payment of police pension benefits to wife where husband had already attained the earliest retirement age under the plan but had not retired and the trial court's order directed the plan to immediately commence payments to wife).

40. *Staller*, 570 N.E.2d at 1332.

C. *How Should Property Be Distributed?*

More than three years after the 1987 amendment to Indiana Code section 31-1-11.5-11(c)[41] to provide a rebuttable presumption that an equal division of marital property is just and reasonable, all five district courts of appeal have issued opinions that discuss the adequacy of the trial court's findings supporting unequal distribution.[42]

Two general principles are emerging. First, a reviewing court will not reverse an unequal property division if the deviation is insubstantial.[43] Second, it appears that the trial court's obligation to explain the basis for an unequal division is more exacting when a request for findings of fact is made pursuant to Indiana Trial Rule 52.[44] There is considerable disagreement, however, as to what is an insubstantial deviation.

In *Seslar v. Seslar*,[45] a husband appealed the trial court's property distribution awarding his wife eighty-five percent of the net marital assets. He claimed the findings were inadequate. In fact, the trial court made extensive findings, pursuant to the husband's Trial Rule 52 request, concerning the relevance of the parties' cohabitation prior to marriage, the pattern of joint contribution during cohabitation and marriage, and the wife's consistently greater earnings throughout the marriage.

Judge Miller, writing for the Fourth District, stated that the findings were ambiguous and did not inform the court why or how the various facts determined by the trial court affected the property distribution.[46] The trial court's findings failed to expressly justify a departure from an equal division. The court noted that "[i]n *Kirkman v. Kirkman*, *where special findings were not requested*, our supreme court held that

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41. Indiana Code § 31-1-11.5-11(c) (Supp. 1991), provides in part, "[t]he court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable. . . ." Subsection 11(c) then provides five considerations, including the contributions of each spouse to the acquisition of property: the extent that property was acquired prior to marriage or through inheritance or gift, the economic circumstances of the parties at the time of disposition and the desirability of awarding the family residence to the spouse having custody of any children, the conduct of the parties as it relates to disposition or dissipation of assets, and the earnings or earning ability of the parties.

42. Riddle v. Riddle, 566 N.E.2d 78 (Ind. Ct. App. 1991); Norton v. Norton, 573 N.E.2d 941 (Ind. Ct. App. 1991); Cox v. Cox, 580 N.E.2d 344 (Ind. Ct. App. 1991); Staller v. Staller, 570 N.E.2d 1328 (Ind. Ct. App. 1991); Seslar v. Seslar, 569 N.E.2d 380 (Ind. Ct. App. 1991); Marriage of Snemis, 575 N.E.2d 650 (Ind. Ct. App. 1991).

43. Kirkman v. Kirkman, 555 N.E.2d 1293, 1294 (Ind. 1990); Cox v. Cox, 580 N.E.2d 344, 350 (Ind. Ct. App. 1991).

44. Seslar v. Seslar, 576 N.E.2d 1330, 1332 (Ind. Ct. App. 1991).

45. 569 N.E.2d 380 (Ind. Ct. App. 1991).

46. *Id.* at 383.

'express trial court findings will not be compelled for insubstantial deviations from precise mathematical equality.' However, *Kirkman* does not indicate what magnitude of disparity will trigger the specific finding requirement."[47] Also, *Kirkman* does not indicate whether express findings must support merely an unequal distribution or must explicitly explain the reasons for an unequal division.

On rehearing, the court left no doubt that *Seslar* stands for the proposition that a more exacting explanation of the basis for an unequal distribution is required when special findings of fact are requested:

> Next, Claudia claims there is a conflict between our decision in *Seslar* and other decisions in the first and third districts of this court handed down before and after *Seslar*. Specifically, she cites *Riddle v. Riddle* for the proposition that "it is unnecessary for the trial court to state its reasons for deviating from the statutory presumption, but articulation on the record of relevant evidence is sufficient to support an unequal division of property." She also cites *Staller v. Staller* as contrary to our holding in *Seslar*. We have reviewed these cases and find that there was no mention of a request, pursuant to T.R. 52, for findings of fact.[48]

A trial court's task concerning an unequal distribution under Indiana Code section 31-1-11.5-11(c) is now apparent: "express trial court findings will not be compelled for insubstantial deviations from precise mathematical equality"[49] in the division of marital property. However, when special findings of fact have been requested pursuant to Indiana Trial Rule 52, "[s]pecial findings [must] provide the parties *and the reviewing court* with a theory on which the trial court decided the case so that the right to review may be effectively preserved."[50] It appears that Indiana appellate courts will review on a case-by-case basis whether the trial court, in the absence of a request for special findings, has articulated a sufficient basis for an unequal division and whether the deviation is insubstantial.[51]

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47. *Id.* (citation omitted).

48. *Seslar*, 576 N.E.2d at 1332 (citations omitted).

49. Kirkman v. Kirkman, 555 N.E.2d 1293, 1294 (Ind. 1990).

50. *Seslar*, 569 N.E.2d at 383.

51. *Cf.* Staller v. Staller, 570 N.E.2d 1328 (Ind. Ct. App. 1991) (trial court adequately supported its determination and did not abuse its discretion in making a 60/40 split); Cox v. Cox, 580 N.E.2d 344 (Ind. Ct. App. 1991) (55/45 split was an insubstantial deviation). *But see Cox*, 580 N.E.2d at 353 (Rucker, J., dissenting) (the disparity in *Cox* was greater than the disparity in *Euler v. Euler*, 537 N.E.2d 555 (Ind. Ct. App. 1989)); *In re Marriage of Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989); *R.E.G. v. L.M.G.*, 571 N.E.2d 298 (Ind. Ct. App. 1991) (60/40 split amounting to $50,000.00 deviation from equality was not insubstantial).

In *Board of Trustees v. Grannan*[52] the Fourth District Court of Appeals held a Qualified Domestic Relations Order (QDRO) dividing a husband's Public Employee Retirement Fund (PERF) benefits defective and remanded the cause to the trial court for modification.[53] The appellate court held that the trial court improperly ordered the direct distribution of the husband's benefits to the wife in violation of the State Public Employee's Retirement Fund statute that prohibits attachment or assignment of benefits.[54] The trial court also improperly ordered the husband's benefits to be distributed at his earliest eligibility date, thereby forcing him to retire early or forcing the Fund to pay retirement benefits before his actual retirement.[55] Relying upon rules of statutory construction to determine whether the QDRO could order the assignment of benefits despite the prohibition in the PERF statutes, the court concluded that the portion of the trial court's order requiring action in violation of the plan's provisions was invalid.[56] The order was precluded not only by the plan's provisions, but by the QDRO that indicated that it should not be construed to require the plan or plan administrator to provide any type or form of benefit or any option not otherwise provided under the plan.[57]

At the same time, the court held, as did the supreme court in *Adams*, that the dissolution statutes and state statutes giving rise to the plan could be construed harmoniously.[58] Indiana Code section 31-1-11.5-11(b)(4) authorizes the division of expected future pension benefits "by setting aside to either of the parties a percentage of those payments either by assignment or in kind at the time of receipt."[59] Although the trial court erred in ordering an assignment of benefits, a distribution of those benefits could still be effectuated by payments in kind at the time of receipt.[60] The appellate court held the *Adams* decision dispositive regarding the issue of forced early retirement.[61]

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52. 578 N.E.2d 371 (Ind. Ct. App. 1991).
53. *Id.* at 376.
54. *Id.* at 372.
55. *Id.* at 374, 376. The QDRO provided:

> The Plan will pay directly to the Alternate Payee her share of benefits in the full amount to which she is entitled. . . . The Alternate Payee shall have the right to elect to receive benefit payments under the Plan at the earlier of 1) any time beginning when the Participant attains (or would have attained) earliest retirement age under the Plan, as defined by IRC §414 (p)(4), or, 2) at any time otherwise permitted by law or the plan.

Id. at 373.

56. *Id.* at 374.
57. *Id.*
58. *Id.* at 375.
59. IND. CODE § 31-1-11.5-11(b)(4) (1988).
60. Board of Trustees v. Grannan, 578 N.E.2d 371, 376 (Ind. Ct. App. 1991).
61. *Id.* at 376-77 (citing *In re* Marriage of Adams, 535 N.E.2d 124, 127 (Ind. Ct. App. 1991)).

In *Riddle v. Riddle*,[62] the husband appealed several issues regarding the dissolution of his marriage. Specifically, he challenged the award to his wife of forty percent of a monthly annuity payment and the survivor benefit from a structured settlement fund arising out of the husband's automobile accident. The annuity and marital residence were the primary assets of the marriage. There was no dispute that the annuity fund was subject to distribution. The appellate court noted there was no error in including the annuity because the husband's right to receive it was absolute prior to the filing of the petition, and the total value of the annuity was fixed, readily ascertainable, and payable regardless of whether he survived.[63] The husband claimed error because the trial court also awarded his wife the survivor benefit.[64]

The court emphasized that the legislature's intent in enacting the property distribution statute was to insure that all property rights are settled with certainty at the time of dissolution, whether the award is made by payment of a lump sum, installments, or a transfer of property.[65] A trial court must dispose of all marital property in one final settlement. No part of the distribution may be conditioned upon a subsequent change in circumstances.[66] The court concluded its analysis by holding:

> [The husband's] receipt of any of the monies awarded him is contingent upon his continued survival. Should he die tomorrow, neither he nor his estate will have received his full share of the marital assets while Shirley will have received far more than the trial court could have reasonably intended.
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> This is not to say that the annuity in question does not constitute a present vested interest which is subject to division. Rather, as Raymond argues, the manner in which the trial court chose to award the asset fails to comport with statutory requirements. Had the trial court awarded Raymond the entire annuity including the survivorship benefit and Shirley a cash award payable in installments with interest, the award would have achieved the division with the certainty required by Indiana law.[67]

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62. 566 N.E.2d 78 (Ind. Ct. App. 1991).

63. *Id.* at 81.

64. The annuity, without regard to the survivor benefit, was valued at $402,000. The survivor benefit had not been valued.

65. *Riddle*, 566 N.E.2d at 81.

66. *Id.* (citing Waggoner v. Waggoner, 531 N.E.2d 1188, 1189 (Ind. Ct. App. 1988); Murphy v. Murphy, 510 N.E.2d 235, 237 (Ind. Ct. App. 1987)).

67. Riddle v. Riddle, 566 N.E.2d 78, 82 (Ind. Ct. App. 1991).

In a concurring opinion, Judge Shields offered the alternative of awarding a proportional share of the annuity to each party including the survivor benefits, which could be accomplished by indicating that each party *and his or her designated beneficiary* would receive the proportionate share of each monthly benefit.[68] Although this alternative might be possible when the asset is a structured settlement annuity, federal law precludes division of a qualified joint and survivor annuity in the context of a QDRO dividing qualified private pension plan benefits.[69]

D. "No Fault" Means No Fault

In this age of pervasive societal concern over acquired immune deficiency syndrome (AIDS), the temptation to base property distribution on a possible transmission of the HIV virus, despite Indiana's "no fault" divorce statute, was too great for the trial court in *R.E.G v. L.M.G.*[70] In a principled and meticulously reasoned decision, Judge Robertson inexorably reduced the basis of the trial court's reasoning for the uneven division of property to perceived marital misconduct.

In *R.E.G.*, the husband appealed the distribution of sixty percent of the marital assets to his wife which was based, at least in part, upon the trial court's finding that the husband's homosexual relationships may have placed his wife at risk for developing AIDS. At the outset, Judge Robertson noted that express trial court findings will not be compelled for an insubstantial deviation from precise mathematical equality[71] and that the case did not involve an insubstantial deviation because the deviation was approximately $50,000.[72]

Judge Robertson proceeded to dismantle the trial court's fault-based rationale:

> We must also note at the outset that the trial court has expressly based its decision—at least in part—upon fault. Simply stated, we will not tolerate the injection of fault into modern dissolution proceedings. The Indiana Dissolution of Marriage Act which was adopted in 1971 expressly abolished the previously existing grounds for divorce which required a finding of fault on the part of one of the spouses. . . . Frankly, we are quite surprised that after twenty (20) years' experience under the "new" Act, we are required to state that the conduct of the parties during the

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68. *Id.* at 84 (Shields, J., concurring).

69. William M. Troyan, *Drafting and Qualifying a Court Order in a Domestic Relations Case*, 20 FAM. L.Q. 3 (1986). *See also* 29 U.S.C. § 1001 (1988).

70. 571 N.E.2d 298 (Ind. Ct. App. 1991).

71. *Id.* at 301 (citing Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990)).

72. *Id.*

> marriage—except as it relates to the disposition or dissipation of property—is irrelevant to the trial court's division of marital assets. Ind. Code § 31-1-11.5-11(c). Our task in the present case, as we perceive it, is to determine—after removing fault from the analysis—whether the trial court's finding that the statutory presumption that an equal distribution of marital property is just and reasonable has been rebutted can be sustained.[73]

Judge Robertson's methodology employed a process of elimination to show that the wife's contention (and the trial court's finding) that the risk that the wife might develop AIDS impacted her economic circumstances was implicitly based upon fault and not fact. Judge Robertson held that the evidence taken in its entirety "regarding the risk that the wife could develop AIDS is entirely conjecture or speculation and is insufficient to support the wife's claim."[74] The evidence was undisputed that the last sexual contact between the husband and wife occurred sometime in 1987. The husband also testified that he had been tested for HIV on several occasions and had tested negative.[75]

After determining that the "health and economic circumstances" justification for the unequal distribution was based on fault, the court addressed whether the finding that the husband was underemployed by choice supported an unequal division of assets. The husband asserted that his underemployment was not voluntary, but was the result of limited employment opportunities available to a middle-aged executive in the late 1980s. He presented voluminous evidence of efforts to obtain employment comparable to his past relevant work.[76] Although the uncontroverted evidence indicated that the husband did travel for a couple of months, he did so without any objection from his wife.[77] During this period of time, the marital debt increased as the result of his travels and the disruption of his employment.[78] The court concluded that "even if all the parties' 'credit card' type debt were to be charged to the husband as dissipation of marital resources, the amount of such dissipation would not approach the magnitude of the trial court's deviation from an equal division of marital property."[79] Considering the totality of the circumstances, including the husband's thirty year career and accumulation of the greatest part of the marital assets, the court con-

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73. *Id.*
74. *Id.* at 303.
75. *Id.* at 302.
76. *Id.* at 304.
77. *Id.*
78. *Id.* at 305.
79. *Id.*

cluded that "the trial court's deviation from equality greatly in excess of any such dissipation is punitive in nature and constitutes an abuse of discretion."[80]

The husband also appealed the award of fees to his wife. The trial court found that a substantial portion of her fees and costs related to valuation issues, the husband's refusal to acknowledge his pension as an asset, and issues relating to the circumstances under which the marriage terminated. The court of appeals held that the trial court erred in basing its award of nearly all of the wife's attorney's fees in part on a finding that the husband's sexual preference contributed to the failure of the marriage.[81] The cause was reversed and remanded with instructions to enter a new award of fees without regard to issues relating to the failure of the marriage and without considering fault.[82] The court noted, however, that misconduct directly resulting in additional litigation expenses may properly be taken into account in the trial court's decision to award attorney's fees in dissolution proceedings.[83] This appears to be the only sense in which fault is a proper consideration when awarding attorney's fees.

In *Norton v. Norton*,[84] previously remanded for explanation because of an unequal property distribution, the court remanded for a second time because the trial court's findings that the parties' debt was a "mess of the husband's making" and that the wife had to "put up" with him for nearly thirty years, smacked of fault greatly at odds with any dissipation by the husband.[85]

E. Fraud and the Affirmative Duty to Disclose

The duty of a divorcing spouse represented by counsel to disclose assets and values to an unrepresented party is instructive and could give divorce attorneys cause to consider how to handle a *pro se* opponent. In *Selke v. Selke*,[86] the wife was not represented by an attorney and later indicated that she believed her husband's attorney represented both parties. According to their settlement agreement, the husband received

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80. *Id.*

81. *Id.* at 306.

82. *Id.*

83. *Id. See also* Jenkins v. Jenkins, 567 N.E.2d 136 (Ind. Ct. App. 1991) (fault in the nature of misconduct that directly results in additional litigation expenses may properly be taken into account, but the mere lack of success in bringing a petition before the court is not sufficient to support an award of attorney's fees in favor of a prevailing party without additional evidence about the parties' relative financial circumstances).

84. 573 N.E.2d 941 (Ind. Ct. App. 1991).

85. *Id.* at 944-45.

86. 569 N.E.2d 724 (Ind. Ct. App. 1991).

all of his pension rights. The wife did not appear at the final hearing and their agreement was approved.[87] Several months later, the wife unsuccessfully filed a petition to set aside the agreement on the basis of fraud.[88] At the hearing on the wife's motion, testimony revealed that the plan was worth in excess of $60,000, that the wife never asked the husband about the plan's value, and that the husband never provided that information to the wife. On appeal, Judge Chezem, speaking for the Fourth District, agreed with the wife that each party "had a duty 'to fully disclose the assets of the marriage' and [the husband's] failure to do so amounts to 'constructive fraud.'"[89] Judge Chezem stated:

> We first note that property settlement agreements in dissolution of marriage cases are encouraged in Indiana. "The public policy of this state favors the amicable settlement by written agreement of the property rights of those citizens who are having their marriages dissolved." In addition, there should be "full disclosure" by the parties when they negotiate and execute property settlement agreements. The parties should disclose the information they have with respect to their property and its value, especially where one party is not represented by counsel. Otherwise, the agreement may be set aside for fraud. As noted in *Stockton v. Stockton* a property settlement agreement may be set aside where the record demonstrates "some unfairness, unreasonableness, manifest inequity in the terms of the agreement, or that the execution of the agreement was procured through fraud, misrepresentation, coercion, duress or lack of full disclosure."[90]

Mrs. Selke knew of the existence of the pension plan before signing the settlement agreement, but never concerned herself with its value, perhaps out of ignorance that her husband's pension was marital property and subject to division. If she had been represented by counsel, would the husband and his counsel have had an affirmative duty to bring the pension's value to the attention of their opponents? The prior decision in *Atkins* indicates that the answer depends upon the nature of the asset, the accessibility of information about its value, and the parties' covenants regarding disclosure of financial information.[91]

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87. *Id.* at 725-26.
88. *Id.*
89. *Id.* at 726.
90. *Id.* (citations omitted).
91. Atkins v. Atkins, 534 N.E.2d 760 (Ind. Ct. App. 1989).

F. *Enforcement of Divorce Obligations*

The United States Supreme Court in *Farrey v. Sanderfoot*[92] reversed the Seventh Circuit Court of Appeals ruling affirming the avoidance of a divorce decree-created lien on the marital residence awarded to the husband.[93] In that case, the parties were divorced after twenty years of marriage. Gerald Sanderfoot was awarded the vast majority of the assets and was ordered to pay Jeanne Farrey approximately $29,000. To secure the debt, Farrey was granted a lien against the marital residence until the debt was paid. Sanderfoot failed to make any payment to his ex-wife. Instead, he filed a Chapter Seven bankruptcy petition and listed his residence as exempt homestead property. He filed a motion to avoid his ex-wife's lien under section 522(f)(1) of the Bankruptcy Code. Although his motion was denied by the Bankruptcy Court, the district court reversed and was upheld by a divided Seventh Circuit. The Supreme Court granted certiorari to settle a conflict among the courts of appeal.

Justice White, writing for the Court, reasoned that a debtor cannot avoid the fixing of a lien to his property under Bankruptcy Code section 522(f)(1) unless the debtor had his property interest before the lien attached.[94] Because both parties agreed that, under Wisconsin law, the divorce decree terminated their prior property interests and created new interests, the award of the marital residence to the husband was akin to purchasing a new residence from a third party with an existing lien.[95] Alternatively, Justice White reasoned that had the decree not extinguished the parties' pre-existing interests, the lien would not have encumbered Sanderfoot's interest, but would have transferred the wife's interest to him with a simultaneously created encumbrance.[96] Under either theory, the lien would not be avoidable under section 522(f)(1) of the Bankruptcy Code.[97]

As pointed out in the concurring opinion of Justices Kennedy and Souter, the case turned on the fact that a divorce decree in Wisconsin terminates pre-divorce property rights and creates new ones.[98] Thus, depending upon the interpretation of state law or the specific wording of a property settlement agreement or divorce decree, a divorce debtor may be able to avoid a judicially created lien in favor of the former spouse. This will occur if the agreement is interpreted to effect the

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92. 111 S. Ct. 1825 (1991).
93. *Id.* at 1831.
94. *Id.*
95. *Id.* at 1830-31.
96. *Id.*
97. *Id.* at 1831.
98. *Id.* at 1832 (Kennedy, J., concurring).

encumbrance of an existing right instead of terminating those rights and creating new rights with a simultaneously created lien.[99]

II. Spousal Maintenance

Parties seeking spousal maintenance did not fare well during this survey period. There was only one published decision in which maintenance was ordered, and it was reversed on appeal. In *Grammer v. Grammer*[100] the court of appeals cautioned the trial courts that there must be articulated reasons supported by the evidence to uphold an award.[101] The trial court did not find Mrs. Grammer to be physically or mentally incapacitated, and the evidence did not establish that her education or employment was interrupted during the marriage. As a result, the court's order that the husband pay his wife twenty-five dollars per week as maintenance and any school expenses and to maintain her medical insurance was reversed for failure to satisfy any of the subsections of Indiana's maintenance statute.[102]

In *Dahnke v. Dahnke*[103] the trial court's continued denial of rehabilitative maintenance to the wife was reversed and remanded a second time.[104] The court of appeals again focused upon required statutory findings, this time holding that the trial court's failure to consider the fourth statutory factor, the time and expense necessary to acquire sufficient education or training to enable the wife to find appropriate employment, was an abuse of discretion. The trial court wholly failed to mention or discuss the evidence presented, despite an abundance of relevant testimony.[105]

Even when a spouse is disabled, the trial courts retain discretionary authority to grant or deny maintenance. In *Axom v. Axom*,[106] the court

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99. *Id.* at 1831-32.

100. 566 N.E.2d 1080 (Ind. Ct. App. 1991).

101. *Id.* at 1082-83.

102. *Id.* at 1083. *See* Ind. Code § 31-1-11.5-11(e)(1)-(3) (1988).

103. 571 N.E.2d 1278 (Ind. Ct. App. 1991). The trial court was previously instructed, upon remand, to enter findings consistent with the appellate determination that the wife's education was interrupted and to reconsider awarding her rehabilitative maintenance in light if its new findings and the provisions of Indiana Code § 31-1-11.5-11.

104. *Id.* at 1282.

105. *Id.* at 1281. During their marriage, Mrs. Dahnke became pregnant by her husband and had to drop out of high school. She had sufficient credits, however, and did graduate. She wanted to attend college but this was precluded by her pregnancy. The few jobs she had during the parties' 14 year marriage all involved low income employment. After the parties separated, she successfully completed the Scholastic Aptitude Test and then completed several courses at Purdue University. *Id.* at 1279-80.

106. 565 N.E.2d 1097 (Ind. Ct. App. 1991) (reversed and remanded in part on unrelated issue).

of appeals held that the trial court did not abuse its discretion in failing to award spousal maintenance even though Mrs. Axom was sixty-one years old, disabled, and receiving social security disability insurance benefits.[107] The court believed that Mr. Axom's ability to support himself was marginal and that she had additional resources available to provide for her support as a result of the property settlement.[108]

There is a distinction between parties' freedom to contract regarding their own rights and obligations and those of their children, whose welfare the courts are duty bound to protect under the doctrine of *parens patriae*. In *Bowman v. Bowman*,[109] a husband's action to modify maintenance was dismissed and affirmed on appeal.[110] Pointing out the distinction between maintenance by agreement and maintenance ordered pursuant to statute, the court of appeals held that the parties' settlement agreement, prohibiting modification of spousal support, was merged and incorporated into the final decree, was enforceable, and did not violate Indiana's statute permitting modification of maintenance orders.[111]

The court distinguished this case from *Meehan v. Meehan*[112] in which a child support obligation was found subject to modification, pursuant to Indiana Code section 31-1-11.5-17(a), despite a provision in the parties' agreement stating it could not be modified. The *Meehan* decision speaks only to modification of child support orders. Public policy supporting modification of child support is different from the public policy regarding settlement agreements. The court of appeals held that the modification statute applies only to awards of spousal maintenance premised upon a court's finding of incapacity.[113]

III. Children

A. Custody

1. *Are Post-Dissolution and Post-Paternity Custody Modifications Different?*—Unknown to many family law practitioners is the fact that dissolution and paternity matters are governed by statutes establishing

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107. *Id.*

108. *Id.* at 1098. *See also In re Marriage of Snemis*, 575 N.E.2d 650 (Ind. Ct. App. 1991).

109. 567 N.E.2d 828 (Ind. Ct. App. 1991).

110. *Id.* at 831.

111. *Id.* The husband claimed a change in circumstances in that the wife had recovered from her disability and was now capable of supporting herself.

112. 425 N.E.2d 157 (Ind. 1981).

113. *Bowman*, 567 N.E.2d at 830.

different standards for modification of custody.[114] This difference was first noted with some consternation in 1984 by the Third District Court of Appeals in *Griffith v. Webb*[115] in which the court recommended that the legislature examine the apparent discrepancy for constitutional infirmities.[116] The issue has arisen again, resulting in conflicts between the Third District's decision in *Griffith*, the Fourth District's decision in *Walker v. Chatfield*,[117] and the First District's decision in *In re Grissom*.[118]

In *Grissom*, paternity of the parties' daughter was established in 1988. By agreement, custody was awarded to the mother, and the father was granted visitation privileges. The father later filed a petition seeking custody of his daughter, alleging that the mother had removed his daughter from Indiana without notifying him or the court and that his visitation rights had been violated. The father was granted temporary custody.

After the hearing, the trial court found that prior to the father's petition, the mother changed residences three times and visited her daughter only a few times during the ten month period in which the father had temporary custody. The trial court specifically concluded that it was in the best interests of the child that she be placed in the custody of her father and awarded the mother visitation privileges. The mother appealed, and the father did not supply the court of appeals with a brief, thereby permitting a reversal upon a mere showing of *prima facie* error in the trial court's judgment.[119] The court noted that, in its discretion, it could decide the case on its merits and chose to do so.[120]

The mother argued that the trial court's use of the "best interest" standard provided by Indiana Code section 31-6-6.1-11(e) is the wrong standard to use for custody modifications. She contended that the court should have used the standard employed in post-dissolution custody

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114. Indiana Code § 31-1-11.5-22(d) (1988) sets forth the standard for modification of a custody order made pursuant to the dissolution of marriage act:

> The court in determining said child custody, shall make a modification thereof only upon a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable. In making its determination, the court shall not hear evidence on matters occurring prior to the last custody proceeding between the parties unless such matters relate to a change of circumstances.

Indiana Code § 31-6-6.1-11(e) (1988), pertaining to the modification of custody orders entered in a paternity action, states "the court may modify an order determining custody rights whenever modification would serve the best interests of the child."

115. 464 N.E.2d 384 (Ind. Ct. App. 1984).

116. *Id.* at 385.

117. 553 N.E.2d 490 (Ind. Ct. App. 1990).

118. 573 N.E.2d 440 (Ind. Ct. App. 1991).

119. *Id.* at 442.

120. *Id.*

modifications—changed circumstances rendering the existing custody order unreasonable.[121]

Chief Judge Ratliff, speaking for the First District, noted the *Griffith* court's suggestion that the legislature examine the discrepancy between the standards for post-paternity and post-dissolution custody modifications and that the legislature had not changed the provision. Siding with the analysis of the Fourth District in *Walker v. Chatfield*, the court stated:

> We agree with the *Walker* court that it is in the child's best interest to require a substantial and continuing change in circumstances before modifying a custody order. Therefore, we hold that in a custody modification proceeding arising out of a paternity action, the petitioning party must demonstrate a substantial and continuing change in circumstances so as to make the existing custody order unreasonable. If we were to hold otherwise, serious constitutional problems may arise.[122]

After reviewing the record, Chief Judge Ratliff held that the trial court did not articulate, and the court did not find, evidence of substantial and continuing circumstances making the original custody order unreasonable.[123]

Judge Staton issued a vigorous dissent. First, he flatly declared *Walker v. Chatfield* to be incorrect.[124] He then stated that the majority's reliance upon *Walker* was wrong because it refused to follow the *Griffith* decision in which the court held that it is the task of the Indiana Legislature to change the statutes.[125] The conflict among the district courts of appeal appears ripe for resolution by the Indiana Supreme Court.

2. *Is The Law of Third Party and Natural Parent Custody Disputes Changing*?—A previous survey of recent developments in family law[126] noted the departure brought about by *Turpen v. Turpen*[127] from the rigorous three-part test established in *Hendrickson v. Binkley*[128] for third

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121. *Id.*

122. *Id.* at 443.

123. *Id.*

124. *Id.* at 444 (Staton, J., dissenting).

125. *Id.*

126. Michael G. Ruppert, *Survey of Recent Developments in Family Law*, 23 IND. L. REV. 363 (1990).

127. 537 N.E.2d 537 (Ind. Ct. App. 1989).

128. 316 N.E.2d 376 (Ind. Ct. App. 1974), *cert. denied*, 423 U.S. 868 (1975). The *Hendrickson* court stated the three-step process as follows:

First, it is presumed that it will be in the best interests of the child to be placed

party, natural parent custody disputes.[129] It appears that the departure from a mechanical approach in evaluating the evidence in third party natural parent custody disputes continues.

In *Hunt v. Whalen*,[130] Mr. and Mrs. Whalen, the paternal grandparents of David Whalen, successfully petitioned for custody of the child with whom they had been awarded visitation rights in the parents' divorce proceeding. They regularly exercised visitation prior to their custody petition and on several occasions took the child to a doctor who expressed concerns about several health and developmental problems experienced by David. At the hearing on the paternal grandparents' petition for custody, the mother, Claudette Hunt, did not appear. The grandparents were awarded custody, and the mother was given limited visitation privileges. The mother appealed from the denial of her motion to set aside the default judgment, asserting that the trial court's decision was contrary to law because the grandparents failed to show she was unfit, had acquiesced in their custody of David, or had voluntarily relinquished custody of the child as required by *Hendrickson*. In response, the grandparents argued that they had offered sufficient proof of the mother's unfitness and, relying on *Turpen*, urged the court to reject "a mechanical approach to custody disputes involving parents and non-parents."[131]

The potential erosion of the *Hendrickson* standard caused by *Turpen* may be accelerated by the decision in *Hunt* and, in particular, its interpretation of *Walker*.[132] Speaking for the Third District in *Hunt*,

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> in the custody of the natural parent. Secondly, to rebut this presumption it must be shown by the attacking party that there is (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of one of these above three factors, then it will be in the best interests of the child to be placed with the third party.

Id. at 380. *Hendrickson* also established that the presumption must be rebutted by "clear and cogent evidence." *Id.* at 381.

129. Ruppert, *supra* note 126, at 377.

130. 565 N.E.2d 1109 (Ind. Ct. App. 1991).

131. *Id.* at 1111.

132. In *Walker*, the mother appealed the trial court's order granting the father's petition for modification of the original custody order. According to the evidence, however, actual physical custody of Gloria Walker's daughter would be with the father's mother. On appeal, Mrs. Walker argued two theories for reversal of the juvenile court's order modifying custody. The first was that the father was required to show a substantial and continuing change of circumstances justifying modification of custody in order to obtain custody, not simply that modification was in the child's best interest. The court of appeals agreed. *Id.* at 492, 496. Alternately, Gloria Walker argued that awarding legal custody to the father was, in effect, tantamount to awarding custody to his mother, a third party.

Judge Staton noted, "Judge Robertson [in *Turpen*] defined the appropriate inquiry as whether there existed evidence supporting the trial court's determination that the presumption favoring the natural parent had been sufficiently rebutted."[133] However, his discussion of *Walker v. Chatfield* for the proposition that it clarified the standard of proof supporting a transfer of custody from a parent to a third party is troublesome:

> Subsequently, in *Walker v. Chatfield*, this court considered the standard of proof which will support a transfer of custody from a parent to a third party. Custody was not appropriately removed from the custodial (and natural) parent absent a showing of (1) abandonment; (2) unfitness of the natural parent; (3) substantial change in custodial parent's home which was detrimental to the child's welfare; or, (4) unreasonableness of the original custody order.[134]

This analysis of *Walker v. Chatfield* is suspect and unnecessary to the decision in *Hunt*. In fact, the trial court in *Hunt* appeared to have ample evidence of the mother's unfitness; it specifically found that "clear and convincing evidence . . . [overcame] the legal presumption in favor of the natural mother,"[135] as required by *Hendrickson*. The *Hunt* court's discussion has the potential for eroding further the *Hendrickson* standard for natural parent, third party custody disputes because it implies that elements 3 and 4 in *Walker* may justify removing custody from the natural parent and placing the child with a third party.

Failure to show factors 1 or 2 — the child was abandoned or the custodian was unfit — would apply to a natural parent, third party custody dispute. Factors 3 or 4 would apply to a child custody modification proceeding in which the party seeking custody is required to show a substantial and continuing change of circumstances. The *Hunt* court, by lumping together all four potential situations as supporting a transfer of custody from a natural parent to a third party, has arguably given future litigants the opportunity to argue that a substantial change

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The *Walker* court, giving great deference to *Hendrickson v. Binkley*, stated:

> In summary, the evidence does not support a change of custody from Mother to Father—and, certainly does not support a transfer which is, in effect, to a third party. Father did not show: (1) the child was abandoned; (2) the Mother was unfit; (3) a substantial change in Mother's home occurred which was detrimental to the child's welfare; or, (4) the original custody order was unreasonable.

Id. at 503.

133. Hunt v. Whalen, 565 N.E.2d 1109, 1111 (Ind. Ct. App. 1991).

134. *Id.* (citations omitted).

135. *Id.*

in the custodial parent's home, which is detrimental to the child's welfare, but which does not rise to clear and convincing proof of unfitness, can form the basis for a transfer of custody.

3. *What Is An Inconvenient Forum For The Litigation of Custody?*—During the survey period one notable case involving the Uniform Child Custody Jurisdiction Act (UCCJA)[136] was decided. *Horlander v. Horlander*[137] does not present a particularly difficult question of conflicting jurisdiction over a child custody proceeding. The case is interesting, however, for its holdings that the UCCJA applies to proceedings in a foreign nation,[138] that the "significant connections" test for jurisdiction is not an alternative to the "home state" test when the latter is still applicable,[139] and that even if the foreign nation exercises jurisdiction over the custody matter in substantial conformity with state law, the trial court's finding in *Horlander* that the foreign nation would provide the more convenient forum was an abuse of discretion.[140]

In *Horlander*, the trial court's finding that France was the more convenient forum was the key issue. Even if France had not exercised child custody jurisdiction in substantial conformity with the UCCJA, the court recognized that commentary applicable to Indiana Code section 31-1-11.6-6(a) and the policy against simultaneous custody proceedings would allow the trial court to decline jurisdiction if Indiana was an inconvenient forum under Indiana Code section 31-1-11.6-7.[141] Reciting the factors to be considered in determination of inconvenient forum,[142] the court held that the trial court abused its discretion in dismissing the custody dispute on the basis of inconvenient forum in light of the evidence that the children were born in Indiana, lived in Indiana all their lives until they were removed several months prior to the filing of the father's petition in Indiana seeking custody, the father's family and the parties' friends lived in Indiana, relevant evidence pertaining to the wife's medical condition was in Indiana, and many witnesses who could testify as to both parents' fitness to raise the children were in Indiana.[143]

C. *Child Support*

There were twenty or more published child support decisions during the survey period. Several of the most significant are discussed below.

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136. IND. CODE §§ 31-1-11.6-1 to -25 (1988).
137. 579 N.E.2d 91 (Ind. Ct. App. 1991).
138. *Id.* at 94.
139. *Id.* at 97.
140. *Id.* at 99.
141. *Id.* at 97-98.
142. *Id.* at 98.
143. *Id.*

Whether or not the trial court order provided sufficient articulation to support a deviation from the Indiana Child Support Guidelines was among several issues decided in *Talarico v. Smithson*.[144] A former wife's action for modification of child support resulted in an order compelling her former husband to pay $145 per month in addition to veteran's and social security benefits she already received on behalf of the children.[145] The wife appealed and the Third District Court of Appeals held that the availability of the noncustodial parent's veteran's benefits and social security benefits did not justify a deviation from the Child Support Guidelines.[146] The appellate court's conclusion turned on the fact that even if the amount received on behalf of the children for the veteran's and social security benefits was added to the ordered child support payment, the resulting lump sum received on behalf of the children would still be below the suggested guideline amount.[147]

The court of appeals decision in *In re Paternity of Buehler*[148] provides guidance in determining when underemployment and potential income are to be considered in calculating child support. The court of appeals reversed the trial court's order to pay child support in an amount disproportionate to the father's present income based on its determination that he was underemployed.[149] The husband was valedictorian of his high school class and had obtained two Bachelor of Arts degrees in physics and chemistry. He operated a photo studio. The court of appeals noted that after receiving his college degrees, the father had unsuccessfully sought employment, and there was no evidence that he had rejected any employment offers or that there were any employment opportunities for which he was especially qualified.[150] In deciding the issue, the court of appeals noted:

> The commentary to Support Guideline 3 discloses two purposes in the provisions calling for the determination of potential income. One is to discourage a parent from taking a lower paying job to avoid the payment of significant support. The other is to fairly allocate the support obligation when one parent remarries and, because of the income of the new spouse, chooses not to be employed. No mention is made of using child support as a tool to promote a society where all work to their full economic

144. 579 N.E.2d 671 (Ind. Ct. App. 1991).
145. *Id.* at 672.
146. *Id.* at 673.
147. *Id.*
148. 576 N.E.2d 1354 (Ind. Ct. App. 1991).
149. *Id.* at 1356.
150. *Id.*

potential, or make their career decisions based strictly upon the size of potential paychecks.[151]

Because the father was engaged in the same occupation and earned relatively the same amount of income during the parties' relationship, which endured for about ten years and resulted in the birth of the child, the court of appeals held that there was no basis for determining that he was underemployed when calculating his support obligation.[152]

In *Davis v. Vance*,[153] the appellate court affirmed the trial court's determination that a father's child support obligation should not be abated during his incarceration because a parent's support obligation cannot be abated before it accrues.[154] It is unclear what the court meant because the father's request was in the nature of a petition to modify child support and was filed prior to his period of incarceration. This case represents an extension of the prior decision in *Cardwell v. Gwaltnery*,[155] in which the court held that a support obligation cannot be retroactively excused for a period of incarceration.[156] In *Davis*, the court emphasized that the duty of support is ongoing and that one must take responsibility for one's crimes and all repercussions: "It would be contrary to the Indiana Child Support Guidelines and to the very nature of our public policy favoring a child's security and maintenance to allow payments to abate based on a willful, unlawful act of the obligor."[157] In light of this language, the court appears to be holding that an anticipated period of unemployment resulting from incarceration will not justify a modification of child support.

The decision in *Matson v. Matson*[158] points out an important exception to the rule that overpayments of child support are not creditable and are deemed voluntary gifts. A trial court denied a father's petition for credit resulting from a tax intercept and was reversed on appeal. The Fifth District Court of Appeals held that an overpayment resulting from an inappropriate application of a tax interception is not a voluntary overpayment of child support or a gratuity.[159] The rationale for this deviation from the general rule is found in the federal statute authorizing a tax intercept, which specifically provides that excess amounts withheld shall be paid to the obligor.[160]

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151. *Id.* at 1355-56.
152. *Id.* at 1356.
153. 574 N.E.2d 330 (Ind. Ct. App. 1991).
154. *Id.* at 331.
155. 556 N.E.2d 953 (Ind. Ct. App. 1990).
156. *Id.* at 954.
157. *Davis*, 574 N.E.2d at 331.
158. 569 N.E.2d 732 (Ind. Ct. App. 1991).
159. *Id.* at 734.
160. 42 U.S.C. § 664(a)(3)(D) (1988).

The Indiana Supreme Court carved a narrow exception to the prohibition against retroactive modification of child support in *Kaplon v. Harris*.[161] A former husband petitioned to modify child support after emancipation of two of his children and the death of another. Chief Justice Shepard provided the following rationale:

> Without an exception to the no-credit rule, a non-custodial parent would be forced to file a petition to modify before making arrangements for a child's funeral if the parent wished to preserve the possibility of gaining financial participation by the other parent. Courts should not impose such a grisly requirement upon a parent who is facing the tragedy of a child's death. Consequently, we hold that a trial court may properly entertain a request concerning funeral expenses retroactively through a petition to modify or through a claim for credit.[162]

At the same time, the court found that the trial court's allowance of a one-third credit on the support obligation after the death of the child was an improper retroactive modification and remanded the case for a new calculation of the support which had accumulated prior to the filing of the petition to modify.[163]

Finally, the most publicized recent support decision is *Neudecker v. Neudecker*[164] in which a father unsuccessfully appealed an order increasing his child support obligation and requiring payment of reasonable college expenses. The Second District Court of Appeals affirmed the trial court's determination and the Indiana Supreme Court granted transfer to address the father's claim that the dissolution statute authorizing trial courts to order parents to pay sums for their children's educational expenses is unconstitutional. His argument was premised on the fact that although the dissolution statute authorizes a court to order payment of all children's college costs, married parents are not legally required to provide a college education for their offspring. In rejecting his equal protection argument, the supreme court approved the court of appeals finding of a rational relationship between the child support statutory scheme and the state interest in seeing that children of divorced parents are afforded the same opportunities as children of married parents.[165]

The court also pointed out that the right to make educational decisions necessarily follows custody and that it is not a violation of a noncustodial parent's liberty rights to order him to bear the reasonable

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161. 567 N.E.2d 1130 (Ind. 1991).
162. *Id.* at 1133.
163. *Id.* at 1132, 1133.
164. 577 N.E.2d 960 (Ind. 1991).
165. *Id.* at 962.

cost, or portion thereof, for that education.[166] Based on the court's rationale, it is likely the result would have been the same even if the parties had joint custody.

IV. Miscellaneous

Topel v. Miles[167] is a must read decision issuing a strong edict to adoption practitioners. A consent to adoption by either natural parent cannot include any right to ongoing contact. In *Topel*, a visitation agreement in favor of a natural father executed with his Consent to Adoption was held to be a consent-vitiating factor that rendered his consent invalid.[168] Despite the agreement, the visitation arrangement soon faltered, and the natural father was offered the return of his child upon payment of approximately $3,000 (estimated to be the expenses incurred in caring for the child). He was advised that the adoption would proceed and that he would no longer be allowed visitation.

The court of appeals believed it impossible for a father to validly consent to the termination of all parental rights and at the same time retain the right to exercise visitation privileges. The court held, *as a matter of law*, that "consent" does not exist under these circumstances.[169] The appellate court, citing a previous decision, declared that a Decree of Adoption severs forever every part of the parent-child relationship and engrafts the child upon a new family tree.[170] For all legal and practical purposes, an adopted child is the same as dead to his parents, and they lose the right to ever see the child again.[171] The appellate court held that the issue of an invalid consent may be raised by the intervention of the natural parents or by a petition to withdraw consent and that the burden of proof is on the natural parent.[172] The court of appeals reversed the judgment and remanded for proceedings consistent with its decision.[173]

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166. *Id.*

167. 571 N.E.2d 1295 (Ind. Ct. App. 1991).

168. *Id.* at 1299. The adoptive parents were the brother and sister-in-law of the natural mother. By its terms, the "visitation agreement" was intended to guarantee ongoing visitation by the natural father every other weekend, was not limited to the period of time prior to a final adoption decree, and did not indicate that the visitation would be subject to termination in the future. Although the natural mother did not sign a "Visitation Agreement," it is likely the adoptive parents orally promised that she would have ongoing contact with her child in light of the relationship of the parties.

169. *Id.*

170. *Id.* at 1298 (citing Bryant v. Kurtz, 189 N.E.2d 593 (Ind. Ct. App. 1963)).

171. *Id.*

172. *Id.*

173. *Id.* at 1299. In a footnote, the appellate court indicated that because the consent of both parents is essential in an adoption, it was unnecessary to analyze the validity of the natural mother's claim that her consent was also invalid. *Id.* at 1299 n.3.

V. Recent Legislation

Recent legislation focused on children. Statutes were added and amended regarding support, protection, paternity, services, and education. Several are briefly discussed below.

House Enrolled Act 1631 amends various statutes relating to child support. Subsection (g) was added to section 31-1-11.5-12 of the Dissolution Act and provides that the obligation to pay support arrearages does not terminate when the duty to support ceases.[174] The Uniform Reciprocal Enforcement of Support Act (URESA)[175] was amended to authorize the trial courts to make a determination of paternity, when necessary, to establish a duty of support.[176] This act also establishes jurisdiction to make original paternity determinations. As a result, the circuit court now has concurrent original jurisdiction with the Juvenile Court and Probate Court, enabling all three to establish paternity under URESA to facilitate enforcement of a support duty.

Indiana Code section 31-2-10-4 was amended to broaden the definitions of income and income payor.[177] Indiana Code section 31-2-10-8 was amended to include URESA actions when the court makes an original determination of paternity and when income withholding applies.[178] It further narrows the basis for contesting activation of an Income Withholding Order solely to a "mistake of fact." The prior basis of "good cause" has been eliminated.[179] Indiana Code section 31-2-10-18 has been broadened to permit termination of an Income Withholding Order only when *both* the duty to support ceases and no child support arrearage exists. Subsection 19 was added to provide for activation of an Income Withholding Order if support is delinquent, the Income Withholding Order cannot be activated under other sections, and the duty to support has ceased.[180]

House Enrolled Act 1501 amended Indiana Code 33-2.1-1 by adding Chapter 10 which creates an Indiana Child Support Advisory Committee.[181] A bipartisan, gender balanced committee including two judges whose case loads include domestic relations, two professionals in an economic or other relevant field, two attorneys who conduct at least fifty percent of their practice in domestic relations, four members of the general assembly, one custodial parent, and one noncustodial parent

174. Ind. Code § 31-1-11.5-12(g) (Supp. 1991).
175. Ind. Code § 31-2-1-1 to -39 (1988 & Supp. 1991).
176. Ind. Code §§ 31-2-1-1(1), 31-2-1-19(b), 31-1-2-19.5 (1988 & Supp. 1991).
177. P.L. 201-1991 (to be codified at Ind. Code § 31-2-10-4).
178. *Id.* (to be codified at Ind. Code § 31-2-10-8).
179. Ind. Code § 31-2-10-13(b) (1988).
180. Ind. Code § 31-2-10-19 (Supp. 1991).
181. Ind. Code § 33-2.1-10-1 to -9 (Supp. 1991).

was established. Members are appointed for staggered two year terms beginning August 1, 1991. The purpose of the committee is to review the Child Support Guidelines and make appropriate recommendations regarding amendments. The committee must submit an annual report to the supreme court and the legislature by August 1. The supreme court may then amend the guidelines based upon the recommendations provided.[182]

After extensive hearings by the Family Law Study Committee, the Uniform Marital Property Act, House Bill 1499 and Senate Bill 406, was again introduced and finally passed out of the House Judiciary Committee. However, it was defeated on the floor of the House.

VI. Conclusion

During this survey period, Indiana courts focused upon dispelling fault, in the nature of misconduct during the marriage, as a valid basis for awarding a disproportionate share of property or attorney's fees in a dissolution of marriage proceeding. The courts placed equal emphasis upon the necessity of trial courts to supply more adequate findings when deviating from 50/50 property divisions, the presumptive guideline child support amounts, and when granting or denying awards of maintenance. There was also some clarification of the different standards applicable when seeking modifications of custody in post-divorce and post-paternity actions. Legislative changes in the family law area addressed the support, protection, paternity, services for, and education of, our children. We can anticipate the continuing development and clarification of property distribution, spousal maintenance, and child support awards, as well as future revisions to the Child Support Guidelines.

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182. *Id.*